

APPEAL NO. 042521
FILED DECEMBER 6, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing (CCH) was held on September 15, 2004. The disputed issue was the respondent's (claimant) impairment rating (IR). The appellant (self-insured) appeals the hearing officer's determination that the claimant's IR "cannot be determined at this time." No response was received from the claimant.

DECISION

Reversed and remanded.

It is undisputed that the claimant sustained a compensable injury to his back and neck on _____. The parties stipulated that the claimant reached maximum medical improvement (MMI) on August 25, 2001. It is undisputed that the Guides to the Evaluation of Permanent Impairment, fourth edition (1st, 2nd, 3rd, or 4th printing, including corrections and changes as issued by the American Medical Association prior to May 16, 2000) (AMA Guides 4th edition) applies to this case. Medical reports reflect that prior to reaching MMI, the claimant underwent a multilevel cervical spinal fusion in June 2000 and then underwent a second cervical operation in July 2001 to remove some hardware. It is undisputed that the cervical surgeries were related to the compensable injury. A required medical examination doctor assigned the claimant a 10% IR in January 2002 utilizing the AMA Guides 4th edition. The designated doctor appointed by the Texas Workers' Compensation Commission (Commission) assigned the claimant a 10% IR in February 2002 utilizing the AMA Guides 4th edition. The 10% IR assigned by the designated doctor consisted of 5% impairment under Diagnosis-Related Estimates (DRE) Cervicothoracic Category II and 5% impairment under DRE Lumbosacral Category II. The treating doctor assigned the claimant a 24% IR in March 2003 utilizing the AMA Guides 4th edition. The designated doctor, in response to a Commission request to review a medical report, declined to change the 10% IR. In response to another Commission request to review an EMG report, the designated doctor again declined to change the IR. The record does not reflect that the designated doctor was made aware of Commission Advisory 2003-10, signed July 22, 2003, or Commission Advisory 2003-10B, signed February 24, 2004.

For a claim for workers' compensation benefits based on a compensable injury that occurred before June 17, 2001, Section 408.125(e) provides that if the designated doctor is chosen by the Commission, the report of the designated doctor shall have presumptive weight, and the Commission shall base the IR on that report unless the great weight of the other medical evidence is to the contrary, and that if the great weight of the medical evidence contradicts the IR contained in the report of the designated doctor chosen by the Commission, the Commission shall adopt the IR of one of the other doctors. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.6(i) (Rule 130.6(i))

provides that the designated doctor's response to a Commission request for clarification is considered to have presumptive weight as it is part of the doctor's opinion.

The hearing officer noted in his decision that there was no evidence that cervical flexion and extension x-rays were done prior to the multilevel cervical fusion, that the designated doctor should have been asked to consider Advisory 2003-10 in light of the claimant's multilevel cervical fusion, and that the Commission should correspond with the designated doctor and ask him to consider Advisory 2003-10. The hearing officer found that the designated doctor did not consider the applicability of Advisory 2003-10 and decided that the claimant's IR cannot be determined at the time of the CCH and that the Commission should write to the designated doctor asking him to reconsider his IR based on Advisory 2003-10.

The self-insured appeals the hearing officer's decision contending that: (1) the hearing officer erred in not holding the record open pending a response from the designated doctor with regard to the applicability of Advisory 2003-10; (2) that the hearing officer erred in not determining that the claimant's IR is 10%; and (3) that the designated doctor need not consider Advisory 2003-10 because the advisory is invalid.

In Texas Workers' Compensation Commission Appeal No. 032399-s, decided November 3, 2003, the Appeals Panel held that for CCH's held after July 22, 2003, involving IRs for spinal surgery that would be affected by Commission Advisory 2003-10, it is error not to consider and apply that advisory. In Texas Workers' Compensation Commission Appeal No. 042108-s, decided October 20, 2004, the Appeals Panel, after referring to Advisories 2003-10 and 2003-10B, noted that it had previously held that it did not have the authority to overrule those advisories and then stated:

Under these Commission advisories, a certifying doctor has the option to assign an IR based on DRE Category IV to an injured employee with a multilevel fusion. Rather than stripping the certifying doctor of the ability to exercise his or her independent medical judgment in assigning an appropriate IR in each individual case, the two Commission advisories merely give the certifying doctor this additional option.

Although these Commission advisories do not require the assignment of an [IR] based on DRE Category IV if there is a multilevel spinal fusion, the Commission advisories must be considered as part of the certifying doctor's process in determining the appropriate IR. Also, an IR based on DRE Category IV for a multilevel spinal fusion may not be assigned if flexion and extension comparison x-rays were taken, prior to the surgery, that would show whether there was spinal loss of motion segment integrity as described in the AMA Guides at pg. 3/98 and 99. See Texas Workers' Compensation Commission Appeal No. 041429-s, decided August 4, 2004, and Texas Workers' Compensation Commission Appeal No. 040489, decided April 26, 2004. To the extent language in prior decisions, such as Appeal No. 032399-s, *supra*, and Appeal No. 040489, *supra*, can

be interpreted to require doctors to assign an IR for a multilevel spinal fusion based on DRE Category IV, that interpretation is incorrect and rejected.

Because the claimant in this case had a multilevel cervical spinal fusion as a result of his compensable injury prior to reaching MMI, and there is no evidence that presurgery flexion and extension x-rays were performed, the hearing officer properly concluded that the designated doctor should consider Commission Advisory 2003-10. However, instead of holding the record open and sending the designated doctor a letter of clarification, the hearing officer determined that the claimant's IR could not be determined. It appears that the hearing officer intends for the Commission to seek clarification from the designated doctor in this regard. In light of Section 410.163(b) and the recent holding in Albertson's, Inc. v. Ellis, 131 S.W.3d 245 (Tex. App.-Fort Worth 2004, pet. denied), we find that the hearing officer erred in failing to hold the record open to request clarification from the designated doctor. Section 410.163(b) provides in pertinent part that the hearing officer shall ensure the preservation of the rights of the parties and the full development of facts required for the determinations to be made. In Ellis, supra, the court characterized the Appeals Panel's affirmance of a hearing officer's determination that the IR could not yet be determined because further development of the evidence was necessary through the appointment of a second designated doctor, as a remand. The court noted that the mere failure of the Appeals Panel to use the word "remand" in its opinion did not make its nonfinal decision final for the purpose of judicial review, and was, in effect, a remand. In the instant case, because the hearing officer did not seek clarification from the designated doctor and then determine the claimant's IR, we must remand for him to do so. See Texas Workers' Compensation Commission Appeal No. 042660, decided November 24, 2004.

We reverse the hearing officer's decision that the claimant's IR cannot be determined and we remand the case to the hearing officer for further consideration and development of the evidence consistent with this decision. On remand, the hearing officer shall: (1) ensure that the designated doctor is still qualified to act in such capacity; (2) seek clarification from the designated doctor, if the designated doctor is still qualified to act in that capacity for this matter; (3) make the designated doctor aware of Commission Advisories 2003-10 and 2003-10B and of the principles set out in Appeal No. 042108-s, *supra*, with regard to the application of the advisories; (4) provide all parties with the letter of clarification to the designated doctor and the designated doctor's response and give the parties an opportunity to respond to the designated doctor's response; and (5) make a determination on the claimant's IR. In the event the designated doctor is no longer qualified to act in that capacity, the record would need to be held open for the appointment of another designated doctor and for a determination on the claimant's IR.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new

decision is received from the Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods.

The true corporate name of the insurance carrier is **(a certified self-insured)** and the name and address of its registered agent for service of process is

**CT CORPORATION SYSTEM
350 NORTH ST. PAUL STREET
DALLAS, TEXAS 75201.**

Robert W. Potts
Appeals Judge

CONCUR:

Thomas A. Knapp
Appeals Judge

Margaret L. Turner
Appeals Judge